Supreme Court, U. S.
FILED
AUG 12 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75 - 86

JOHN B. WALSH, JR., et al.,
Appellants,

v.

MONTGOMERY COUNTY, MARYLAND, et al.,
Appellees.

On Appeal
from the Court of Appeals of Maryland

MOTION TO DISMISS OR AFFIRM

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August 12, 1975

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The appellees in the above-entitled case hereby move this Court, pursuant to Rule 16 of the Rules of this Court, to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Court of Appeals of Maryland, on the ground that the questions presented herein are so insubstantial as not to need further argument.

STATEMENT OF THE CASE

This appeal raises questions as to the validity, under the United States Constitution, of the Financial Disclosure Ordinance of Montgomery County, Maryland, Chapter 20A, Montgomery County Code (1974) (hereinafter usually referred to as "Chapter 20A"). That ordinance was upheld against federal constitutional attacks, as well as state constitutional and statutory challenges, in a unanimous decision of the Court of Appeals of Maryland on April 14, 1975. The opinion of the Court below is attached to the Jurisdictional Statement as Appendix A, and the ordinance is attached thereto as Appendix B.

Chapter 20A was enacted by the Montgomery County Council and signed by the County Executive in June 1974. Among other things, that ordinance requires certain county officials, both elected and appointed, to file annual financial disclosure statements; it identifies the various schedules of financial interests that must be disclosed; and it defines the enforcement responsibilities of the County Attorney, including the issuance of advisory opinions upon the request of a person required to file, investigating complaints of alleged violations, and -- in the case of a person who fails to comply after notice and an opportunity to do so -- seeking a writ of mandamus from the circuit court to compel compliance. The provisions of Chapter 20A are summarized in more detail in the opinion of the court below. (Jur. St. App. A, pp. 4a-7a.)

The appellants instituted suit on July 29, 1974, unleashing a barrage of constitutional and statutory attacks on Chapter 20A and seeking declaratory and injunctive relief. On October 10, 1974, the Circuit Court

for Montgomery County granted the appellants' motion for summary judgment. On April 14, 1975, the Court of Appeals of Maryland unanimously reversed the trial court's decision, rejecting all of the appellants' arguments and upholding the validity of Chapter 20A.

ARGUMENT

The appellants contend here that Chapter 20A, on its face, violates their alleged constitutional rights of privacy, violates their alleged constitutional right to hold appointed or merit public office, is so vague as to deny them due process of law, and violates the Equal Protection Clause. These claims are plainly insubstantial. Three times in the last few years this Court has declined review of similar constitutional attacks on state financial disclosure requirements; and, in any event, the thorough and well-reasoned opinion of the court below demonstrates beyond question that the appellants' contentions are wholly without merit.

I. APPELLANTS HAVE ALLEGED NO DECISIONAL CONFLICT, AND THIS COURT HAS THRICE DECLINED REVIEW IN SIMILAR CASES.

The appellants do not claim that the decision of the court below is in conflict with any decision of this Court. Nor could they, for there is no such decision holding or even intimating that financial disclosure laws, such as Chapter 20A, are not constitutional. Furthermore, the appellants have not alleged that the Maryland Court of Appeals' decision conflicts with a decision from any other jurisdiction. To the contrary, it is clear that the decision below is in accord with the jurisprudence of other jurisdictions.

At this time, there appear to be five reported decisions (in addition to the decision of the court below) in which state courts of last resort have passed on the constitutionality of modern comprehensive financial disclosure legislation. In only one of those cases, the first to be decided, did the court strike down a financial disclosure law. City of Carmel-by-the-Sea v. Young, 85 Cal. Rptr. 1, 466 P.2d 225 (1970). But in a later decision the same tribunal (the California Supreme Court) retreated from its prior position and upheld the State's new financial disclosure law against the same constitutional arguments that had moved the majority in the Carmel case. County of Nevada v. MacMillen, 114 Cal. Rptr. 345, 522 P.2d 1345 (1974). In all the other reported decisions, the courts have sustained the constitutionality of the financial disclosure requirements involved. Stein v. Howlett, 52 Ill. 2d 570, 289 N.E.2d 409 (1972), appeal dismissed, 412 U.S. 925 (1973); Fritz v. Gorton, 83 Wash. 275, 517 P.2d 911, appeal dismissed, 417 U.S. 902 (1974); Illinois State Employees Association v. Walker, 57 Ill. 2d 512, 315 N.E.2d 9, cert. denied sub nom. Troopers Lodge No. 41 v. Walker, 419 U.S. 1058 (1974). 1/

In the Stein and Fritz cases, moreover, this Court dismissed appeals from the state

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1/ In addition, two lower state courts have recently upheld state financial disclosure requirements against federal constitutional claims such as those raised here. Alabama State Employees Association v. Wright, C.A. No. 39026 (Ala. Civ., Mont. Co., 1974); Kenny v. Byrne, No. C-2483-74 (N.J. Super. Ct., Mercer Co., 1975).

court decisions for want of a substantial federal question, although the appellants raised federal constitutional challenges similar to those made here. And in the Walker case, which was before the Court just last term, the Court denied certiorari, again despite the constitutional attacks made and despite the fact that the financial disclosure requirements imposed on appointed public officials there went beyond what is required by Chapter 20A. 2/ These dispositions, while summary, show the lack of any substantial federal question presented by the appellants here, and the Court should likewise decline to note jurisdiction in the present case. Cf. Meek v. Pittenger, 44 L.Ed.2d 217, 233 n.16, 43 U.S.L.W. 4596, 4601 n.16 (May 19, 1975). 3/

2/ The executive order involved in Walker covered each state employee who was appointed by the Governor, or who received $20,000 or more per year from the State, or "whose position is subject to undue influence (as determined from time to time by rule of the Board [of Ethics])." 315 N.E.2d, at 11. It required all such covered persons to file copies of their most recent federal and state income tax returns and, in addition, to file a sworn Statement of Economic Interest disclosing detailed financial information, including, inter alia, "close economic associations" and "interests of the spouse and immediate family living with the [declarant]." Id., at 11, 12. And it provided that the disclosure statements, including certain portions of the income tax returns, shall be made available for public inspection.

3/ The appellants themselves recognize that "[t]his Court on three earlier occasions has declined to take jurisdiction and hear oral

(footnote continued on following page)

II. AS THE OPINION BELOW DEMONSTRATES, APPELLANTS' ARGUMENTS ARE INSUBSTANTIAL.

The opinion of the Maryland Court of Appeals thoroughly and convincingly answers the four constitutional attacks on Chapter 20A which the appellants now press, and demonstrates their lack of merit. Accordingly, we need do no more here than briefly summarize the reasons why the appellants' arguments are wholly groundless.

A. The Right to Privacy Claim

The appellants contend that Chapter 20A constitutes an unreasonable, unnecessary, and overbroad invasion of rights of privacy allegedly guaranteed to them by the Constitution. As the court below held, that contention cannot be sustained. (Jur. St. App. A, pp. 9a-19a.) In the first place, it is highly doubtful that the constitutional protection of privacy -- which has been developed in the context of the personal intimacies of the home, marriage, procreation, and child-rearing -- extends to the right alleged by the appellants not to disclose their financial affairs. See

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(footnote continued from preceding page)

arguments [in Stein, Fritz, and Walker]," but they argue that "the time must come for this Court to set the judicial balance for [the] conflicting interests." (Jur. St., p. 13.) They present no reason, however, why the time for hearing such cases is any more ripe now than it was last Term or the Term before.

Illinois State Employees Association v. Walker, supra, 315 N.E.2d, at 16. 4/ Certainly, this Court has never held or implied that there is a constitutional right to the privacy of one's financial affairs or those of one's family. But even if such a general right did exist, the appellants waived that right when they voluntarily entered the arena of public life. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964); and Garrison v. Louisiana, 379 U.S. 64, 74 (1964), where the Court stated:

> "The New York Times rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an

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4/ There, Justice Schaefer, speaking for the court, indicated that there is no such constitutional right of financial privacy, stating:

> "We do not deal in this case with the most intimate relationships of husband and wife or with an effort by the State to control their decisions as to whether and when to have their children. We deal rather with a requirement that the financial affairs of persons who are paid by the public and who occupy positions of high public trust be disclosed."

> official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." (Emphasis added.)

In any event, even if some of the requirements of Chapter 20A did affect some constitutional privacy right possessed by the appellants, those requirements are nonetheless constitutionally justified because they are necessary to promote a compelling interest of Montgomery County. See Roe v. Wade, 410 U.S. 113, 153-155 (1973). It is beyond doubt that the County has a compelling interest, on behalf of its citizens, in ensuring honesty and impartiality on the part of its public officials, the appearance of such honesty and impartiality so as to promote public confidence in government, and the public's right to information touching on their officials' fitness for office. 5/ It is in order to preserve and promote those compelling aims that the County has, through Chapter 20A, required public officials to disclose their financial interests and dealings and those of their spouses and children, so that the public may know of potential financial conflicts of interest.

5/ Thus, Mr. Justice Douglas, joining in the denial of certiorari in the Walker case, supra, commented that the State "has an undeniably strong interest in placing beyond question the integrity of its public service." 419 U.S., at 1059.

In doing so, moreover, Chapter 20A does not -- contrary to the appellants' contentions -- sweep unnecessarily broadly in an area of fundamental constitutional rights. In Broadrick v. Oklahoma, 413 U.S. 601 (1973), this Court considered such an overbreadth challenge to a state statute which prohibited state employees from seeking political office, taking part in the affairs of a political party, or participating in a political campaign. In upholding that statute, the Court stated:

> "[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that [the statute here] is not substantially overbroad and that whatever overbreadth may exist should be cured through a case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied," Id., at 615-16.

The provisions of Chapter 20A are not substantially overbroad within the meaning of Broadrick. The sweep of the ordinance is plainly legitimate; and if the County seriously intends to achieve its ends, a broad disclosure law such as Chapter 20A is essential. For any narrowing of the provisions of that ordinance might well mean that some potential financial conflicts of interest would remain hidden from public knowledge, and consequently the goals sought to be accomplished by the ordinance would not be ensured.

Thus, for example, the appellants complain

that the requirements of Chapter 20A fail to relate disclosure to financial information that has some connection with the functions and duties of the particular official or employee. (Jur. St., p. 12.) But, as the court below pointed out, legislation that was so limited would not guarantee the absence of financial conflicts of interest. (Jur. St. App. A, pp. 16a-17a.) Who is to say whether or not a particular financial interest or transaction has some connection with the County or with the functions of the official or employee required to file? Obviously, letting the employee himself make this determination would hardly ensure his honesty or impartiality or, equally important, public confidence therein. Ultimately, therefore, the public is entitled to say. 6/

Thus, Chapter 20A is not substantially overbroad; and even if quibbles could be put where doubts might arise, "whatever overbreadth may exist should be cured through a case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." Broadrick v. Oklahoma, supra, at 615-16.

B. The Right To Hold Nonelective Public Employment Claim

The appellants also contend that the Constitution guarantees them the right to hold appointed or merit public employment, and

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6/ With regard to the required disclosure of the income and assets of the employee's spouse and children, see the opinion of the court below. (Jur. St. App. A, pp. 17a-18a.)

that Chapter 20A violates that right. 7/ As the Maryland Court of Appeals held, no such constitutional right exists. (Jur. St. App., pp. 19a-21a.) It is true, of course, that nonelective government employment is a "right," rather than a "privilege," in the sense that by accepting it, one does not give up all his constitutional rights, but retains the rights to be free from invidious discrimination therein, to exercise free speech and assembly, to be free (in some circumstances) from termination of his employment without procedural due process, etc. This Court has never held or implied, however, that there is a per se constitutional right to hold nonelective government employment, which will be protected against infringement on its own account apart from violations of other constitutional rights. Cf. Slochower v. Board of Education, 350 U.S. 551, 559 (1956).

Moreover, even if such an illusory right actually existed, Chapter 20A would not infringe that right, since it in no way precludes the appellants from holding public office, but merely requires disclosure of their financial affairs. In any event, as shown above, that ordinance promotes a compelling interest of the County and, in doing so, is not substantially overbroad.

This Court's decisions in Civil Service Commission v. Letter Carriers, 413 U.S. 548

7/ Since none of the appellants is either a candidate for or holder of elective office (or spouse of such elected official), they do not and cannot assert that Chapter 20A violates the right to seek and hold elective office.

(1973), and Broadrick v. Oklahoma, supra, confirm that conclusion. Those cases involved statutes prohibiting various partisan political speeches, associations, and activities by nonelected government employees. Although those statutes limited the plaintiffs' clear First Amendment rights, the Court upheld them because of the government's strong interest in their prohibitions and because they did not sweep unnecessarily broadly in effectuating that interest. The same principles should apply a fortiori in this case, where the appellants have challenged Chapter 20A on extremely questionable constitutional grounds. It is obviously at least as important, if not more so, that public officials make their decisions without financial bias or the appearance thereof as it is that they do so without political bias. Moreover, the Court's rejection of the overbreadth arguments in Letter Carriers and Broadrick, which involved broad statutory prohibitions on certain political expression and activities, should compel the same result when applied to Chapter 20A, which requires only financial disclosure and does not prohibit any expression or conduct.

C. The Vagueness Claim

The appellants' next argument is that Chapter 20A is so uncertain, indefinite, ambiguous, and vague in its provisions as to violate the Due Process Clause of the Fourteenth Amendment. Again, there is no substance to that contention. (See Jr. St. App. A, pp. 21a-23a.) The terms of the ordinance as a whole are "not so vague that 'men of common intelligence must necessarily guess at its meaning.'" Broadrick v. Oklahoma, supra, at 607. The "general class" of cases to which the ordinance applies "is plainly within [its] terms," and therefore it should "not be struck down

as vague even though marginal cases could be put where doubts might arise." Civil Service Commission v. Letter Carriers, supra, at 579; United States v. Harriss, 347 U.S. 612, 618 (1954). Moreover, Chapter 20A itself provides a procedure under which any public official or employee who is uncertain as to the applicability of any provision can seek an advisory opinion from the County Attorney, the official charged with enforcing the ordinance, for the purpose of clarifying the applicability of that provision. (Section 20A-7(c).) A similar arrangement was involved, and approved by this Court, in the Letter Carriers case:

> "It is also important in this respect that the [Civil Service Commission, the agency primarily charged with enforcement of the Hatch Act] has established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law, at least insofar as the Commission is concerned." 413 U.S., at 580.

Furthermore, Chapter 20A does not require any public official to construe it at his peril, for even if an official is found to have violated the ordinance, he may then take whatever steps are necessary to cure the violation without any penalty whatever.

The only specific section of the ordinance which the appellants attack as vague is Section 20A-3(b)(11). (Jur. St., pp. 21-22.) That section requires statements from persons whose governmental duties include making

decisions, taking actions, or recommending decisions or actions with regard to certain narrowly defined areas of governmental activity, carefully limited to precisely those areas in which conflicts of interest are most likely to occur (e.g., contracting, procurement, administering grants, etc.). "The ordinary person exercising ordinary common sense can sufficiently understand" the listing in that section to be able to determine whether it applies to him. See Civil Service Commission v. Letter Carriers, supra, at 579. And if an employee is in doubt as to whether he is covered by that section or whether he is entitled to an exemption therefrom, he can apply to the County Attorney under Section 20A-7(c) for a determination.

D. The Equal Protection Claim

The appellants' final contention is that Chapter 20A violates the Equal Protection Clause, because it requires the financial statements of elected officials and higher-grade appointed officials and employees to be made public, while allowing the statements of certain lower-grade employees to be filed confidentially; and because it excludes from the disclosure requirements those paid members of County boards, commissions, and committees who were appointed prior to the effective date of the ordinance, while providing no similar "grandfather" arrangement for elected officials and full-time appointed public officials and employees. The appellants admit that the proper standard to be applied to these classifications is that of McGowan v. Maryland, 366 U.S. 420, 425 (1961): that the Equal Protection Clause "is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." (Jur. St., p. 24.) The opinion of the court

below demonstrates beyond question that the lines drawn by the County in the above respects are not so irrelevant, but are rational. (Jur. St. App. A, pp. 26a-27a.) Those lines need not be drawn to perfection to pass constitutional muster. Dandridge v. Williams, 397 U.S. 471, 485 (1970). 8/

CONCLUSION

For these reasons, the appellees respectfully submit that the appellants have presented no substantial federal question for the decision of this Court, and that therefore the Court should dismiss this appeal for want of such a question, or, in the alternative, should affirm the judgment of the Court of Appeals of Maryland.

8/ In joining in the denial of certiorari in the Walker case, supra, Mr. Justice Douglas stated that, in his view, the Illinois financial disclosure scheme did not offend the Equal Protection Clause and had been properly upheld, because the State imposed disclosure requirements not only on executive officials, but also on legislators, members of independent agencies, and judges. 419 U.S., at 1059-60. The same is true here. Chapter 20A itself covers Montgomery County's legislators and members of independent agencies, as well as executive officials; and the judges in the County are State judges for whom the Maryland Court of Appeals has adopted similar financial disclosure requirements, pursuant to the State Financial Disclosure Act, Art. 33, §29-9, Ann. Code of Maryland (1974).

Respectfully submitted,

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